IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LAWRENCE E. WILSON, Appellant, v. THOMAS N. CLARK, Appellee.	No. 21665

Appeal from the United States
District Court for the Northern
District of California

APPELLANT'S OPENING BRIEF

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APPELLANT'S OPENING BRIEF

JURISDICTION

The jurisdiction of the United States District Court to issue the writ of habeas corpus was conferred by Title 28, United States Code section 2241. The jurisdiction of this Court is conferred by Title 28, United States Code section 2253, which makes a final order in a habeas corpus proceeding reviewable in the Court of Appeals when a certificate of probable cause has issued.

STATEMENT OF THE CASE

This is an appeal by Lawrence E. Wilson, Warden of the California State Prison at San Quentin,[1/]

1. Lawrence E. Wilson has recently been replaced by Louis S. Nelson.

respondent in the court below and custodian of appellee, Thomas N. Clark, from an order of the United States District Court for the Northern District of California. The order granted appellee's application for a writ of habeas corpus, but execution was stayed until further order of the court.

Proceedings in the State Court

Appellee was charged in an information filed on July 3, 1964, in the Superior Court of the State of California for the County of Orange with a violation of California Penal Code section 211 (robbery) (CTT 1-2).[2/] Appellant was arraigned on the same date, at which time he entered a plea of not guilty to the offense charged.

A jury trial was held September 16, 17, and 21, 1964 (CTT 6-11). The jury found appellee guilty as charged (CTT 13).

On October 15, 1964, appellee's motion for a new trial was granted (CTT 16). The second trial commenced December 14, 1964, and concluded December 16, 1964, at which time appellant was found guilty as charged in the information (CTT 20-24).

The California Court of Appeal, Fourth Appellate District, affirmed appellant's conviction in an

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2. A copy of the Clerk's Trial Transcript lodged with the District Court is lodged with this Court.

unpublished opinion, 4 Crim. No. 2181, filed December 13, 1965. The California Supreme Court denied a hearing February 9, 1966.

Proceedings in the Federal Court

Appellee in an application dated May 16, 1966, filed a petition for a writ of habeas corpus in the Federal District Court for the Northern District of California (TR 1-18). On June 1, 1966, the Honorable Albert Wollenberg issued an Order to Show Cause (TR 24). The return of the Attorney General of California was filed June 15, 1966 (TR 25).

In an order dated October 17, 1966, Judge Wollenberg issued an order granting the writ of habeas corpus, the order being stayed until further order of the court (TR 47-49). The appellant's petition for a certificate of probable cause to appeal was granted October 27, 1966, at which time a notice of appeal was filed (TR 53-54).

Appellee's application for release on his own recognizance was denied December 8, 1966. (TR 56).

Throughout the federal proceedings appellant urged that he was convicted upon perjured testimony and in violation of the rule announced in Griffin v. California, 380 U.S. 609 (1965). The District Court in granting the writ did not reach the question of perjured

testimony. The court held that the rule of Griffin was dispositive of the case (TR 47-49).

STATEMENT OF THE FACTS

The District Court decided this case upon the Reporter's Transcript of appellee's trial which was lodged with the court.[3/]

On March 8, 1964, Richard Guggenmos was working at an American Oil Company station located at 751 Baker Street in Costa Mesa, California (RTT 6-7). Guggenmos was sitting at a desk inside the station getting ready to take a pump reading and to make a money count when appellant Clark and a co-defendant, Nusser, entered the station and told Guggenmos to get into the back room. Appellant was carrying a gun (RTT 9-10). After the three had entered the back room, appellant told Guggenmos to take everything out of his pockets and to lie flat on the floor (RTT 14). One of the robbers then went outside, returning in a short time to ask where the big bills were kept. Guggenmos answered that there were no big bills but gave the robbers the key to the top of the safe (RTT 14). Approximately $70 was taken.

APPELLANT'S CONTENTION

The District Court erred in the conclusion that California's harmless error rule is inapplicable to

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3. A copy of the Reporter's Trial Transcript lodged with the District Court is lodged with this Court.

constitutional rights.

ARGUMENT

THE DISTRICT COURT ERRED IN THE CONCLUSION THAT CALIFORNIA'S HARMLESS ERROR RULE IS INAPPLICABLE TO CONSTITUTIONAL RIGHTS

At petitioner's trial the prosecution remarked as follows (RT 275):

> "Mr. Clark--number one, I would say right off the bat that he has a Constitutional right not to testify, but Mr. Clark hasn't given us the benefit of telling us whether he was or wasn't there. We don't know anything about Mr. Clark. You'll receive an instruction as to how this can be interpreted."

The trial court then instructed the jury as indicated below (CSTT 1-2).[4/]

> "It is a constitutional right of a defendant in a criminal trial that he may not be compelled to testify. Thus, whether or not he does testify rests entirely in his own decision. As to any evidence or facts against him which the defendant can reasonably be expected to deny or explain because

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4. A copy of the Clerk's Supplemental Trial Transcript lodged with the District Court is lodged with this Court.

of facts within his knowledge, if he does not testify or if, though he does testify, he fails to deny or explain such evidence, the jury may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable. In this connection, however, it should be noted that if a defendant does not have the knowledge that he would need to deny or to explain any certain evidence against him it would be unreasonable to draw an inference unfavorable to him because of his failure to deny or explain such evidence. The failure of a defendant to deny or explain evidence against him does not create a presumption of guilt or by itself warrant an inference of guilt, nor does it relieve the prosecution of its burden of proving every essential element of the crime and the guilt of the defendant beyond a reasonable doubt.

"In deciding whether or not to testify, the defendant may choose to rely on the state of the evidence and upon the failure, if any, of the

People to prove every essential element of the charge against him, and no lack of testimony on defendant's part will supply a failure of proof by the People so as to support by itself a finding against him on any such essential element." 51 CALJIC

Concededly, the comment and instruction was constitutional error. Chapman v. California, 386 U.S. 18 (1967); Griffin v. California, 380 U.S. 609 (1965). However, the District Court in granting the writ, incorrectly held that there is no constitutional rule which would be akin to the California "harmless error" rule. See opinion of District Court (TR 47-49). The Supreme Court in Chapman, supra, at page 22, stated:

"We conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction."

The Court then went on to hold that a constitutional error does not require reversal if the appellate court is able to declare a belief that the error was harmless beyond a reasonable doubt.

Appellant submits that the error in the instant

case is harmless beyond a reasonable doubt. First, the prosecution's comment was exceedingly brief. Second, the co-defendant who took the stand was convicted on precisely the same record. Third, the victim of the robbery positively identified appellant, both at the Orange Jail and at the trial (RTT 10, 20). And fourth, the testimony of Mrs. Lambert related the appellant's admissions to her of his perpetrating the robbery and the similarity in the description of the clothing and appearance of the robbers during the time they left petitioner's apartment, robbed the station and returned to divide the stolen cash.

In view of the foregoing, appellant submits that the District Court erred in holding that the harmless error rule does not apply to federal constitutional rights and that the error in the instant case was harmless.

CONCLUSION

We respectfully submit that this case should be remanded to the District Court for consideration in light of Chapman v. California, 386 U.S. 18 (1967) and

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for consideration of the allegation of use of perjured testimony.

Dated: June 16, 1967.

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CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, this brief is in full compliance with these rules.

Dated June 16, 1967

Michael Buzzell

MICHAEL BUZZELL
Deputy Attorney General